STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL DOUGLAS CUTLER,

UNPUBLISHED May 18, 2006

Plaintiff/Counter-Defendant-Appellant,

 \mathbf{v}

No. 265403 Sanilac Circuit Court LC No. 04-030120-DM

STACEY LYNN CUTLER,

Defendant/Counter-Plaintiff-Appellee.

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce. Plaintiff alleges that the trial court erred when it conducted a de novo hearing solely by reviewing the transcripts of the referee hearing when plaintiff requested to call witnesses before the trial court itself. Plaintiff also challenges the trial court's decision to grant sole physical custody to defendant as well as the judgment with respect to specific parenting time. For the reasons set forth in this opinion, we affirm.

The parties' daughter, Kirstie, was born on March 17, 1991, when defendant mother was 21 years old and plaintiff father was 16 years old. The parties were not married at the time. The parties married on August 26, 2000, and their son Christian was born on June 8, 2001. Plaintiff filed for divorce on November 23, 2004, and the trial court granted temporary joint legal and physical custody to both parties, with both children staying with each party on alternating weeks. The trial court ordered a referee hearing concerning custody of the parties' children, parenting time, and child and spousal support. Notably, the trial court's order specifically addressed the issue of a de novo hearing and stated, in relevant part:

The de novo hearing will be conducted by a review of transcript of the Referee Hearing by the Court and any additional testimony that is presented by either party. If either party wishes to present additional testimony to that presented at the Referee Hearing, (s)he shall make such request within the request for a de novo review hearing, specify the witnesses requested to be presented and the

approximate amount of time they [sic] believe such testimony shall take. [Emphasis in original..]

The order was signed by an attorney representing each party, with plaintiff's attorney expressly signing "for Π [plaintiff]." Plaintiff "acknowledges that his [prior] attorney did execute the Stipulation upon which the custody issue was referred to the Friend of the Court."

Following the referee hearing, the referee submitted a recommendation that the parties share joint legal custody and that defendant be awarded primary physical custody. Plaintiff thereafter requested a de novo hearing and attempted to call a witness during the de novo hearing, arguing, among other things, that plaintiff had not personally signed the order permitting a review of the transcript of the referee hearing and that the trial court could not adequately assess credibility without personally observing the witnesses. The trial court noted that the referee hearing concerned only custody, parenting time, and spousal and child support and that the later scheduled divorce trial did not address any of those issues, and if the parties requested the court to deal with custody issues during the divorce trial, the court would address such an argument if either party brought such a motion. The trial court then ruled that plaintiff was precluded from calling any witnesses pursuant to the order that plaintiff's attorney had signed consenting to a de novo hearing by review of the transcript of the referee hearing unless there was a statute or court rule that permitted plaintiff to call a witness at the de novo hearing notwithstanding the stipulation. The trial court also ruled that the de novo hearing would be based on the transcript of the referee hearings and that no new testimony would be admitted.

The court then considered each of the best interest factors listed in MCL 722.23 under a preponderance of the evidence standard and concluded that the best interests of the children would be served by awarding defendant sole physical custody and granting both parties joint legal custody. In making this determination, the trial court opined that defendant's testimony seemed more credible than plaintiff's testimony because plaintiff testified that he had never been convicted of domestic violence and then changed his testimony and because plaintiff acknowledged that he lied to defendant about his whereabouts and about his use of drugs.

During the divorce trial itself, plaintiff argued that he was entitled to a trial on the issues of custody, parenting time, and support, but the court held that those issues had been resolved and stated as follows:

[I]f there is a desire . . . to bring these . . . issue[s] before the [c]ourt, then there is ample remedy to do that by way of motion[,] but I do not believe that the fact that a person has filed for divorce means that [he or she] is entitled on the day of the divorce trial to have the [c]ourt include in the [d]ivorce [t]rial the issue of custody.

The trial court reiterated its prior ruling with respect to custody issues, awarding both parties joint legal custody, awarding defendant sole physical custody, and granting plaintiff "reasonable parenting time" to be determined by the parties or, if the parties could not reach an agreement, by Friend of the Court guidelines. The parties ultimately agreed to a reasonable parenting time schedule.

Plaintiff first argues that MCL 552.507 required the court, upon request, to provide him with a de novo evidentiary hearing and that it is not sufficient under the statute for the trial court to merely conduct a de novo review of the record of the referee hearing. According to plaintiff, he was entitled to a full evidentiary hearing in which he would be permitted to call witnesses and elicit live testimony so that the trial court could personally observe the witnesses' demeanor in order to evaluate their credibility. However, plaintiff's attorney stipulated before the referee hearing that any de novo hearing would be conducted based on the transcript of the referee hearing. Based on the stipulation, we conclude that plaintiff waived his right to call witnesses and present live testimony under MCL 552.507 and MCR 3.215(F)(2) during the de novo hearing by stipulating to allow a de novo hearing based on the transcript of the referee hearing. See Weiss v Hodge (After Remand), 223 Mich App 620, 636; 567 NW2d 468 (1997) ("Where, as here, parties stipulate an arrangement that limits one party's rights to less than that which is otherwise required, that party may not later complain on appeal about this restriction."). A litigant may not rely on error to which he or she consented as a basis for relief on appeal. In re Gazella, 264 Mich App 668, 679; 692 NW2d 708 (2005). Nevertheless, we will review the issue because the limits that may be imposed upon the presentation of evidence at a judicial hearing under MCL 552.507 and MCR 3.215(F)(2) is an issue of continuing concern to the bench and bar and because the issue is an issue of law for which all of the necessary facts have been presented. Detroit Leasing Co v Detroit, 269 Mich App 233, 237-238; ____ NW2d ____ (2005).

In refusing to allow plaintiff to present additional testimony, the trial court expressly observed that MCR 3.215(F)(2)² allowed the court to conduct its de novo hearing based solely on a review of the transcript of the referee hearing pursuant to the parties' stipulation.³ The trial court also found that plaintiff was afforded a full opportunity to present evidence and testimony at the referee hearing and that plaintiff had not shown that any new evidence or new testimony was previously unavailable. MCR 3.215(F)(2)(c). Therefore, our review of this issue requires us to consider whether MCR 3.215(F)(2) or MCL 552.507 required the trial court to conduct a full evidentiary hearing rather than a de novo review of the record of the referee hearing. We review de novo issues of statutory interpretation. *Morrison v East Lansing*, 255 Mich App 505, 522; 660 NW2d 395 (2003).

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¹ We observed in *Weiss* that the stipulation in that case resulted in the trial court failing to apply statutory tort reform requirements, which are "mandatory." *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997). Nevertheless, we maintained that the defendant could not seek redress of an error resulting from his own stipulation. *Id*.

² Although plaintiff claims that MCR 3.215 applies only to post-judgment proceedings, plaintiff has not cited any authority or language from the court rule for this proposition, and the rule, by its express terms, applies to "Posthearing Procedures[,]" i.e., procedures following the referee hearing itself. MCR 3.215(E).

³ We observe that plaintiff does not challenge the trial court's finding that the stipulation itself precluded plaintiff from offering testimony previously offered.

MCL 552.507(4) provides that "[t]he court shall hold a de novo hearing on any matter that has been the subject of a referee hearing, upon the written request of either party or upon motion of the court." In addition, MCL 552.507 provides, in relevant part:

- (5) A hearing is de novo despite the court's imposition of reasonable restrictions and conditions to conserve the resources of the parties and the court if the following conditions are met:
- (a) The parties have been given a full opportunity to present and preserve important evidence at the referee hearing.
- (b) For findings of fact to which the parties have objected, the parties are afforded a new opportunity to offer the same evidence to the court as was presented to the referee and to supplement that evidence with evidence that could not have been presented to the referee.
- (6) Subject to subsection (5), de novo hearings include, but are not limited to, the following:
- (a) A new decision based entirely on the record of a previous hearing, including any memoranda, recommendations, or proposed orders by the referee.
- (b) A new decision based only on evidence presented at the time of the de novo hearing.
- (c) A new decision based in part on the record of a referee hearing supplemented by evidence that was not introduced at a previous hearing.

In this case, the trial court's de novo review of the referee hearing satisfies MCL 552.507. Under MCL 552.507(6), "[a] new decision based entirely on the record of a previous hearing" constitutes a de novo hearing, if the parties have been given a full opportunity to present important evidence at the referee hearing, the parties have been given an opportunity to offer evidence for findings of fact to which the parties have objected, and the trial court's restrictions were reasonable and served to conserve the resources of the parties and the court. For reasons that will be set forth more fully below, we conclude that the trial court's restrictions on plaintiff's ability to present witnesses at the de novo hearing were reasonable and otherwise satisfied MCL 552.507(5). Therefore, we hold that the trial court's de novo review of the referee hearing satisfies MCL 552.507.

The provisions in MCR $3.215(F)(2)^4$ are similar to those in MCL 552.507. MCR 3.215(F)(2) provides that "[t]o the extent allowed by law, the court may conduct the judicial

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⁴ Plaintiff relies on an outdated version of MCR 3.215(F)(2), which has been amended. According to plaintiff, MCR 3.215(F)(2) provides that "[i]f both parties consent, the judicial hearing may be based solely on the record of the referee hearing." However, MCR 3.215(F)(2) (continued...)

hearing by review of the record of the referee hearing, but the court must allow the parties to present live evidence at the judicial hearing." MCR 3.215(F)(2). However, MCR 3.215(F)(2) grants the trial court the authority to impose some restrictions on the parties presenting evidence at such a hearing. Specifically, the court is permitted to:

- (a) prohibit a party from presenting evidence on findings of fact to which no objection was filed;
- (b) determine that the referee's finding was conclusive as to a fact to which no objection was filed;
- (c) prohibit a party from introducing new evidence or calling new witnesses unless there is an adequate showing that the evidence was not available at the referee hearing;
- (d) impose any other reasonable restrictions and conditions to conserve the resources of the parties and the court. [MCR 3.215(F)(2).]

In determining whether the trial court complied with MCR 3.215(F)(2), we must first determine whether a de novo hearing consisting of a review of the transcript of the referee hearing would be "allowed by law" within the meaning of MCR 3.215(F)(2). Here, plaintiff's attorney signed the stipulation allowing the court to conduct a de novo hearing based on the referee's transcript. This stipulation is binding on plaintiff under MCR 2.507(H) because it was in writing and it was signed by plaintiff's attorney. We therefore conclude that a de novo hearing consisting of a review of the transcript of the referee hearing was "allowed by law" within the meaning of MCR 3.215(F)(2) when such a hearing was stipulated to by the parties and the stipulation was in writing and was signed by plaintiff's attorney.

Next, this Court must determine whether conducting the de novo hearing by a review of the record of the referee hearing complied with the provision in MCR 3.215(F)(2) that "the court must allow the parties to present live evidence at the judicial hearing." We reject plaintiff's argument that this court rule mandates the trial court to allow parties to present live testimony at

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has been amended, effective May 1, 2005, and the amended version does not include the language that plaintiff asserts it does. The amended version is accurately reflected in the body of this opinion. Because the de novo hearing was held on July 29, 2005, the trial court properly relied on the amended version of MCR 3.215(F)(2).

⁵ MCR 2.507(H) provides: "An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney." Although plaintiff argues that MCR 2.507(H) is inapplicable because MCR 3.215(F)(2) somehow requires the *party* rather than an attorney to sign such a stipulation, this Court need not address this argument because it is based on language in the court rule that has been deleted.

such a hearing. Such a construction of the court rule directly contradicts the flexibility and discretion that the trial court is specifically afforded under both MCL 552.507(5) and (6) and MCR 3.215(F)(2)(a)-(d). The requirement that the court must permit the "parties to present live evidence at the judicial hearing" is not absolute, and it is not presented in a vacuum. MCR 3.215(F)(2). Rather, it is expressly subject to certain discretionary restrictions and limitations provided in MCR 3.215(F)(2)(a)-(d). In this case, the basis for the trial court's restrictions on plaintiff's ability to present live evidence were subsections (c) and (d). During the de novo hearing, the court read out loud the amended and applicable version of MCR 3.215(F)(2)(a)-(d) and then stated, "So, in other words, while we must allow the opportunity to present that live testimony, the [c]ourt can impose restrictions and . . . those limitations were included in the underlying stipulation[.]" The trial court further noted that it was not denying plaintiff's right to present live testimony, but that it was merely restricting it unless plaintiff could show that the testimony or evidence was previously unavailable or that a court rule or statute would allow new witnesses or evidence despite the stipulation. Thus, plaintiff incorrectly claims that the trial court categorically denied his right to present live evidence when the court merely imposed reasonable restrictions that plaintiff failed to overcome.⁶

Both MCL 552.507 and MCR 3.215 expressly grant the trial court the discretion to impose reasonable restrictions on the parties' ability to present evidence when reviewing a referee hearing. MCL 552.507(5), (6); MCR 3.215(F)(2). In this case, the trial court imposed restrictions with the clear intent to conserve judicial resources. The trial court did not completely preclude the parties from presenting live testimony; rather, the trial court merely imposed reasonable restrictions to conserve the resources of the parties and the court by requiring defendant to show that the testimony was previously unavailable. Such a restriction is permitted under MCR 3.215(F)(2)(c) and (d) and does not in any manner impair the parties' right to a de novo hearing, particularly given the fact that "[a] new decision based entirely on the record of a previous hearing" constitutes a de novo hearing under MCL 552.507(6)(a). Furthermore, given that the trial court has discretion whether to submit the issue to a referee hearing in the first place, MCR 3.215(B)(1)-(2), the trial court did not abuse its discretion in agreeing to submit the matter to the referee subject to the stipulation or in reasonably restricting the presentation of evidence at the de novo hearing. The trial court's conduct did not violate MCR 3.215 or MCL 552.507.

Plaintiff next argues that presentation of the witnesses to the trial court was necessary because it was impossible for the trial court to assess credibility without observing the demeanor of the witnesses. We disagree. Determinations of credibility involve more factors than simply viewing the demeanor of the witnesses. See *Williams v Williams*, 214 Mich App 391, 399; 542 NW2d 892 (1995) ("Credibility' and 'demeanor' are not synonymous. Demeanor may be one

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⁶ We observe that in the context of a circuit court reviewing an arbitration award arising under the domestic relations arbitration act, MCL 600.5070 *et seq.*, our Supreme Court has observed that "as long as the circuit court is able to 'determine independently what custodial placement is in the best interests of the children[,]' *Harvey v Harvey*, 470 Mich 186, 187 (2004), an evidentiary hearing is not required in all cases." *MacIntyre v MacIntyre*, 472 Mich 882; 693 NW2d 822 (2005).

element in assessing a witness' credibility, but often demeanor plays no such role. Such things as motive to lie, lack of opportunity to observe, and prior inconsistent statements may be more important determinants of credibility.") In this case, the trial court was able to make a determination regarding plaintiff's credibility without personally observing plaintiff's demeanor based on the fact that plaintiff offered many different versions of events during his testimony to the referee. The record clearly indicates that plaintiff changed his testimony concerning his domestic violence conviction. In addition, plaintiff testified that his alleged girlfriend was only a friend, but when the alleged girlfriend testified as a witness, she contradicted his testimony about their relationship, and he never challenged her testimony in this regard. We also observe that plaintiff admitted that he lied to his wife about using cocaine. Because the trial court expressly found plaintiff to be less credible based on his inconsistent or changing testimony, which is unrelated to his demeanor, we reject plaintiff's argument that the trial court was unable to make a determination regarding plaintiff's credibility without an opportunity to personally assess his demeanor.

Based on our conclusion that the trial court is authorized to impose restrictions on the presentation of evidence at de novo hearings under MCL 552.507 and MCR 3.215(F), plaintiff's arguments that the stipulation and the trial court's rulings barring him from presenting any additional evidence violate his due process rights at the de novo hearing are without merit. We also observe that plaintiff failed to provide any authority for his arguments in this regard. Therefore, we consider these arguments to be waived. A party who fails to brief the merits of an alleged error has abandoned the issue on appeal. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). A party may not simply announce a position or assert an error in an appellate brief and then leave it up to this Court to discover and rationalize the basis for his claims. *Id*.

Plaintiff next argues that the trial court did not properly weigh the evidence when considering the best interests of the children under MCL 722.23. Although plaintiff concedes that the trial court's findings are supported by the record, he contends that the trial court erred in basing these findings solely on the transcript of the referee hearing rather than on a de novo evidentiary hearing.

In reviewing a custody decision "[f]indings of fact are to be reviewed under the 'great weight' [of the evidence] standard, discretionary rulings are to be reviewed for 'abuse of discretion,' and questions of law for 'clear legal error." *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994); see also MCL 722.28. Under the great weight of the evidence standard, this Court will not disturb a trial court's finding of fact unless the facts "clearly preponderate in the opposite direction" or the decision would result in a miscarriage of justice. *Id.* at 878 (citation omitted). Because the trial court's custody decision is a discretionary dispositional ruling, a custody award should be affirmed unless it constitutes an abuse of discretion. *Fletcher v Fletcher* (*After Remand*), 229 Mich App 19, 224; 581 NW2d 11 (1998).

In making custody determinations, the courts must consider the "best interests of the child." MCL 722.23. The twelve factors to be considered in determining the best interests of a minor child are enumerated in MCL 722.23:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
 - (f) The moral fitness of the parties involved.
 - (g) The mental and physical health of the parties involved.
 - (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
- (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
- (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
- (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

When, as here, joint custody has been requested, the trial court must decide whether joint custody would be in the best interests of the children. MCL 722.26a(1); *Mixon v Mixon*, 237 Mich App 159, 163; 602 NW2d 406 (1999). Although a trial court must consider and state on the record its findings and conclusions with respect to each factor, *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001), which it did, the court is not required to address every matter in evidence nor is it required to comment on every argument made by the parties. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005).

In his brief on appeal, plaintiff concedes that the trial court's findings of fact are supported by the record. Nevertheless, plaintiff challenges the court's findings with respect to factors (b), (c), (f), (g), (h), and (l). With respect to factor (b), plaintiff argues that the trial court erred in finding that the factor favored defendant because defendant was somewhat more

credible. As previously noted, plaintiff waived any arguments that the trial court could not assess credibility on the referee's record when he stipulated to allow the de novo hearing based on the record. Moreover, contrary to plaintiff's argument on appeal, the trial court did not find that this factor favored defendant; rather, the trial court expressly found that the parties were *equal* with regard to factor (b) and merely noted that it found defendant's testimony more credible.

Plaintiff next argues that the trial court erred in finding that factor (c) favored defendant on the basis that defendant provided the children's health insurance and generally took the children to their medical appointments. Plaintiff does not argue that the trial court's factual findings with respect to this factor were incorrect but argues exclusively that the trial court could not properly consider these facts because it is not uncommon for one parent to attend to a child's medical appointments or insurance needs. The fact that defendant provided the children's health insurance and generally transported the children to their medical appointments is related to defendant's capacity and disposition to provide the children with medical care. The evidence does not clearly preponderate against the trial court's findings for factor (c).

Plaintiff next argues that the trial court erred in finding under factor (f) that plaintiff exhibited problems with moral fitness that affected his ability to parent. Plaintiff admitted that he stayed out all night partying some nights during the marriage and that he lied to his wife about cocaine use during the marriage. The trial court expressly noted that even if plaintiff had not used cocaine as he claimed, his willingness to jest about drug use was "an immoral approach to his role as a parent." Under these circumstances, we are not convinced that the trial court's findings regarding factor (f) were against the great weight of the evidence. *Fletcher*, *supra* at 877.

With respect to factor (g), plaintiff argues that the trial court erred in finding that plaintiff's mental health was a concern because plaintiff denied defendant's claim that she had found him on the bathroom floor holding a gun. Plaintiff further argues, essentially, that the trial court should ignore the fact that he admitted that he used his mother's prescription medication in the past because he was working long hours at the time. Based on the fact that plaintiff's testimony was contradictory (he admitted that he lied to defendant), we do not believe that the trial court's findings in this regard were against the great weight of the evidence. *Id.* Further, plaintiff's explanation for using his mother's prescription drugs could reasonably be viewed as expressing an inappropriate and dangerous belief that it is acceptable to use another's prescription medication without consulting a medical professional. The trial court's findings for factor (g) were not against the great weight of the evidence.

Concerning factor (h), plaintiff argues that the trial court erred in finding that defendant was better suited to attend to the educational needs of children. Plaintiff dropped out of high school in ninth grade. He testified that although he read an order from the court expressly requiring him to attend a program, he did not understand that his attendance was mandatory. In contrast, defendant graduated from high school and completed three years of college. Although she also missed the same program, she made it up at the time designated on the order for making it up, and there is no indication that she did not understand the order. Thus, we conclude that the trial court's finding was not against the great weight of the evidence because the evidence regarding this factor does not clearly preponderate in favor of plaintiff. *Id*. On the contrary, it seems to favor defendant.

Finally, plaintiff argues that the trial court improperly assessed credibility under factor (1) and that although he admitted that he lied to his wife about cocaine use, the court improperly considered the same event in both factor (f) and (l). However, the custody factors have some natural overlap, and a single event may be relevant to more than one custody factor. *Fletcher*, *supra* at 25-26. Accordingly, plaintiff has not established error with regard to the trial court's treatment of factor (l).

Plaintiff finally argues that the trial court erred in not making a specific ruling regarding parenting time. "Orders concerning parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). Clear legal error occurs when a trial court incorrectly interprets or applies the law. *Id.*

The parties ultimately stipulated to reasonable parenting time, and plaintiff has not argued that the order has proved unreasonable or unworkable. "An issue is moot when an event occurs that renders it impossible for the reviewing court to fashion a remedy to the controversy." *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004). Here, even if the trial court erred in failing to grant "[p]arenting time . . . in specific terms" under MCL 722.27a(7), remanding this case for the trial court to fashion an order of parenting time in specific terms regarding frequency and duration, MCL 722.27a(1), (7), would not address or remedy the alleged error. Thus we find the issue to be moot.

Affirmed.

/s/ Jane E. Markey /s/ Bill Schuette /s/ Stephen L. Borrello